about three hundred merks, could not be admitted as a part of the rental; because, by the contract of marriage, she being provided in conjunct-fee to the whole barony, had right to the kains and customs, by an attour, the constant rent due by the tenants; and the conversion of the said kains and customs, being only occasioned by the Earl's not living at the place of Esselmount, but at another house far distant; and the warrandice, bearing expressly the lands were worth seventy chalders of victual and one hundred merks, estimated as the price of a chalder,—it could not be the meaning of parties, neither did the words bear to accept of an hundred merks in place of kains and customs.

It was REPLIED, That the contract, giving no right to the Lady but to a life-rent of victual and money-rent, without making mention of kains and customs, and the same being converted and made in a constant rent, long before the contract of marriage, the Lady was bound to accept thereof.

The Lords did sustain the defence; and found, That the Earl was not obliged to make up the whole rental, besides the money paid for kains and customs, they being converted before the contract of marriage.

Page 503.

1675. *November* 13. KER *against* VEATCH.

IN a double poinding betwixt the said parties, as creditors to Sanderson, after Veatch was preferred to Peter Pallet, as to the sum of money contained in Sir George Maxwell's bond, who became debtor to Pallet in place of Colonel Stewart;—compearance was made for Ker, who ALLEGED, That he ought to be preferred to Veatch; because he had a back-bond from the common debtor, declaring, that a part of the debt due by Colonel Stewart did properly belong to him; and therefore could not fall under Sanderson's escheat, nor belong to Veatch as creditor.

It was ANSWERED, and ALLEGED for Veatch, That any such declaration or back-bond, being after Sanderson was denounced rebel, could not be respected; it being a voluntary deed, and did fall within the Act of Parliament 1621.

The Lords did, notwithstanding, prefer Ker; which seems inconsistent with their former interlocutor preferring Veatch to Pallet: seeing the back-bond and declaration was after Sanderson was denounced rebel; and was voluntary, as well as Pallet's assignation, which was found to fall within the Act of Parliament.

Page 504.

1675. *November* 26. FORBES of COLLODINE *against* ROBERT ROSS, late Provost of Inverness, and ALEXANDER PATERSON.

IN a suspension of a decreet, obtained at Cullodine's instance, against the said parties, before the commissary of Inverness; for payment of their proportion of the sum of £6,500, as charges and expenses waired out by him in two actions pursued before the Lords of Session, against the Town of Inverness, in a de-

clarator for being free of exorbitant and arbitrary taxes imposed upon them, as vassals to the town, for mills and lands holden of the burgh, and for regulating the just quantities of the feu-duties of the mill;—the reasons of suspension and reduction being,—That the decreet was null; being given by the commissary, who was nephew to Collodine, the pursuer; whereupon declarator was proponed and repelled. *2d.* That the subject of the action, being for no less than six thousand and odd hundred pounds, which was to be modified for expenses, the same was noways consistorial, the commissary having no warrant to proceed in civil actions above two hundred merks; and the Lords of Session were only competent Judges where processes were to take effect by modifications.

It was ANSWERED to the *first*, That, by Act of Parliament, King James VI, no Judge could be declined but those who were fathers, sons, or brothers. It was ANSWERED to the *second*, That the libel pursued was *articulatus libellus*, and no article did contain above two hundred merks; and, Collodine's oath being taken upon the several articles, the commissary did only decern conform to his deposition.

The Lords, having much debated amongst themselves the *first* reason, and considered the Act of Parliament, which was in King James VI.'s time, Parl. 14, cap. 212, did find, That the said act was only made for the Lords of Session, consisting of fifteen in number, whereof nine was only a quorum; so that, albeit any of their number was nephew to the pursuer, and could not be declined as being one of that number, there being so many others to judge, who had not so near a relation, the said act could not be extended to any other inferior judicature, but that the case ought to be decided, as to them, according to common law and practick: so that, whatsoever could be a just objection against a witness, should be a just reason of declinature against a judge; and, therefore, that an uncle and nephew, being of so near a relation, ought to be received in declinatures of judges, as against witnesses. As to the *second* reason, they found, That, without any new process, the decreet and libel should be considered by the Lords as to the exorbitance of the articles libelled, or modification, and both parties heard thereupon.

After this interlocutor, both parties being heard, it was ALLEGED for the defender, That Collodine, being only *mandatorius*, and having a factory to pursue, the mandate was revoked before litiscontestation; and, therefore, they could not be liable for any charges or expenses after revocation of the mandate; especially he not insisting, after the said revocation, in the suspenders' names, but took out the decreet in his own name, and not in their names; so that it could give them no right without a new process, which behoved to be upon their own expenses.

It was ANSWERED for Collodine, That he being engaged, at the desire of the suspenders, to pursue these actions, wherein they had a joint interest, and having received sums of money for that effect, as their just proportion, did thereupon come to Edinburgh, and insisted before the Lords, until they fixed the said action, by an act ordaining probation, whereupon decreet followed, he was not in the case of *nudum mandatum:* and, albeit he were, the same could not be revoked, *res* not being *integra;* which doth only allow mandatories to revoke their mandate and factory.

The Lords, having considered five missive-letters written to Collodine, whereupon he founded his commission and mandate, which did bear no obligement

to pay for his personal charges, but only to pay proportionally what should be laid out upon the process to advocates, writers, and agents, did find, That they were only liable in so far, and ordained count and reckoning accordingly; seeing it was notour, and made appear, that he had many other particular business of his own, which made him come to Edinburgh, and stay constantly there, many sessions. And, as to that point, that they should be liable after revocation of the mandate, whereupon there was great debate upon the nature of *actio mandati et natura societatis;* whereupon many lawyers were cited, *hinc inde,* for proving that a society, being once entered into amongst parties, none of them could resile, *res* not being *integra*, as was in this case; there being an act admitting probation for both parties, before answer; which was equivalent to an act of litiscontestation, which was *contractus judicialis;* and whereupon sentence behoved to follow, after advising of the depositions, which was done before any alleged revocation.

The Lords did consider this case as not being properly of the nature of a society, or mandate, as to any thing wherein they had not a common interest, such as was the mills, wherein they had a joint interest, and wherein they were all concerned, as to the exorbitance of the multure imposed upon them; but, as to their distinct lands and tenements, whereto every one had a special right of property, and so were only joined in a common complaint against oppression; for which there being no decreet of relief taken before the Lords of Council, as those commissionate by their letters; but upon their own private address, having obtained remedies from the Magistrates; they found them not liable, unless it were proven, *scripto*, or by their oaths, that they had made a fraudulent separation, by agreeing with the Magistrates to desert Collodine, that he might be at the sole charges, and, notwithstanding, they should get the whole benefit that he should obtain by law: but, as to the common interest of the mills, they found them liable proportionally for their charges, they having received benefit by the decreet, notwithstanding they had resiled.

Page 509.

1675. *December* 21. ROBERT KENNEDY, Writer, *against* ALEXANDER SCOTT, Goldsmith, and *against* WILLIAM WALLACE and his CURATORS.

THERE being a bill of advocation presented by the said William and his curators, of a cause depending before the Bailie-court of Edinburgh, for taking away the person of the said William Wallace from Alexander Scott, goldsmith, to whom he was bound apprentice by an indenture;—upon that ground, That the said William's father had made an assignation of his estate, wherein he not only named the said Robert Kennedy, and Oliver Mestertoun, overseers, but, *per expressum*, ordained them to have sole management of the said children's estate, during their minority; and thereupon concluded, that the said David could have no curators who could authorise him to do any deed which might burden his estate, nor dispose upon his person, by making any indenture to serve a master, without advice of the said trustees and overseers: and they having made a prior indenture to Alexander Reid, goldsmith, he ought to be removed from his present master, and enter to that service.